IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 5-12-2007

CORAM

THE HONOURABLE MR.JUSTICE M.CHOCKALINGAM

W.P.No.6388 of 2007
and
MP No.1 of 2007

M/s.Pro Musicals
Represented by its
Proprietor
Sudhin Mark Prabhakar
25, Casa Major Road
Egmore, Chennai 600 008. .. Petitioner

vs

1.The Joint Commissioner of
Customs (Preventive)
Marine and Preventive Wing
II Floor, Everest House
100, Marine Drive,
Mumbai 400 002.
2.The Commissioner of Customs
(Marine - Preventive)
New Custom House
Ballard Estate, Mumbai 400 034.
3.The Commissioner of Customs (Air)
Air Cargo Complex
Meenambakkam, Chennai 600 027. .. Respondents

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Writ petition filed under Article 226 of the Constitution of India praying for a writ of certiorari to call for the records pertaining to F.No.CIU/II-01/06/42 of the first respondent and quash the impugned show cause notice dated 15.1.2007.

For Petitioner : Mr.M.Balagopal

For Respondents : Mr.Ramakrishna Reddy
for Mr.Kalpa Reddy CGSC

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ORDER

Challenge is made to a show cause notice issued by the first respondent in F.No.CIU/ii-01/06/42 dated 15.1.2007, and also a direction to release the detained goods unconditionally as required under Sec.110(2) of the Customs Act 1962, is sought for by the petitioner.

2.The affidavit in support of the petition is perused. The Court heard the learned Counsel on either side.

3.The case of the petitioner in short is that they are engaged in the import and trading of Digital Audio and music production equipments. They imported the musical equipments through the Chennai Airport and had cleared it for home consumption after paying the necessary duty. They sent a part of the legally imported duty paid goods having a market value of Rs.2,26,000/-, to the dealer Sudeep Audio at Mumbai to be exhibited in the exhibition "Palm India Expo 2006" organised by M/s.Infocast Systems Pvt. Ltd. The goods were sent with a delivery challan dated 19.5.2006. The first respondent on 22.5.2006, came to the CST Mumbai Railway Station and detained the petitioner's goods. The representative of the petitioner and its associate in Mumbai have submitted the documents such as bill of entry, copy of the delivery challan, certificate of participation in the exhibition, etc., on 26.5.2006 itself, to the respondents in Mumbai. However, the Officers of the respondents sought for written statements. Accordingly, written statements of the petitioner and that of Auditya of Sudeep Audio were given on the very day. It was clearly stated that the goods were meant for exhibition, and Sudeep Audio is the marketing associate of the petitioner concern. But, not satisfied with that, the Superintendent of Customs (Preventive) working under the first respondent, again called for relevant documents vide letter dated 5.6.2006, which they have replied on 8.6.2006. However, the Superintendent continued to ask for relevant documents. All the letters were suitably replied. While the matter stood thus, the show cause notice was issued on 15.1.2007, after a lapse of 6 months, by the first respondent. Beyond the period prescribed under the Act, it has been issued. Hence, the show cause notice which is hit by the provisions under Sec.110(2) of the Customs Act 1962, has got to be quashed. Apart from that, beyond that period, the goods could not be retained by the respondents, and it has got to be unconditionally released. Hence, the orders have got to be quashed. Thus, the petitioner has come forward with the writ petition.

4.The Court heard the learned Counsel for the petitioner who reiterated the averments in the petition.

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5.The learned Counsel for the respondents would submit that an interception was made on 22.5.2006 in respect of the consignment in question; that the representative of the petitioner has admitted that it belonged to the petitioner; that he produced certain documents in order to show the ownership; but, they were not in complete form, and thus, he was further directed to produce the documents in complete form in order to satisfy the ownership, but not done; that under the circumstances, a communication was addressed; that a reply was given on 8.6.2006; but, it did not contain the proper explanation or the reply or the documents; that following the same, the goods were seized after following the procedural formalities on 2.8.2006; that after the seizure, a show cause notice was issued on 15.1.2007; that a plain reading of Sec.110(2) of the Customs Act 1962, would reveal that the show cause notice can be issued within a period of six months from the date of seizure; that since the seizure was made on 2.8.2006, the show cause notice could be issued on or before 1.2.2007; that in the present case, it was issued on 15.1.2007, and thus, it was well within time; that proceedings have been initiated; that in such circumstances, it is for the petitioner to put forth its explanation, and hence, the show cause notice cannot be said to be out of time either, or it is hit by the provisions under Sec.110(2) of the Customs Act, or there is necessity for the release of the goods.

6.The learned Counsel for the petitioner relied on a decision of the Calcutta High Court reported in 2003 (156) ELT 344 (CAL.) (ESI LTD. V. UNION OF INDIA) and would submit that in the instant case, there is no specific provision speaking about the detention of the goods; that the dominion over the goods was lost; that it was within the department; that the detention and seizure are one and the same thing; that the department cannot say that it was a seizure fairly made on 2.8.2006, and the limitation would commence only from that day; but not to be so; and that the period of limitation would commence only from 22.5.2006 on which date the goods were seized by the department.

7.In answer to the above, it is contended by the respondents' Counsel that the detention of the goods by the department is not the seizure as contemplated under Sec.110(2) of the Act; that in a given case, when the goods were detained, it was only a restraint made, and calling for the production of the documents; that if produced properly and the department is satisfied, the goods would be immediately released; but, if not so, seizure under Sec.110(2) of the Act would follow; that in the instant case, originally it was detained on 22.5.2006; that sufficient opportunity was given; that the documentary evidence was not produced; that under the circumstances, there arose an action for seizure as envisaged under Sec.110(2) of the Act, following which the show cause notice has been issued, and under the circumstances, the writ petition has got to be dismissed.

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8.The Court paid its anxious consideration on the submissions made by the learned Counsel on either side.

9.The petitioner seeks to quash the show cause notice and also for the return of the goods. It is not in controversy that on 22.5.2006, the first respondent Department on interception, found the consignment. According to the petitioner, after a few days, its representative appeared before the Department along with certain documents claiming that they are the owners of the goods. The Department was not satisfied. Then, the petitioner was further called upon to produce documents in proof of the ownership. According to the Department, it was not done, and following the procedural formalities, the goods were seized on 2.8.2006, and a show cause notice was served upon the petitioner on 15.1.2007. It could be seen that the petitioner rested the whole case on the question of limitation that the impugned show cause notice has been issued after a period of six months from the date of the seizure as one envisaged under Sec.110(2) of the Customs Act, 1962, since the goods were taken on 22.5.2006; but, the show cause notice was issued on 15.1.2007 which is after a lapse of six months. The learned Counsel for the petitioner relied on a decision of the Calcutta High Court referred to above and would submit that the legislative intent in applying the provision could have been only that once a dominion over the property is lost by the party, and it came to the hands of the department, it has got to be taken as seizure as found under Sec.110(2) of the Customs Act, and the Department cannot come forward to say that the custody of the goods was taken on one day, and they were kept under detention, and subsequently, on the other day to its convenience, seizure was effected; and that both cannot be different. Relying on the said decision, the learned Counsel would further submit that it is only a formal seizure which is done; that the date of detention is the date of seizure, and thus, the show cause notice is out of time, since the said provision is mandatory, and hence, it has got to be struck down and the goods be returned. The learned Counsel for the respondents would contend that in order to apply or have shelter under Sec.110(2) of the Customs Act, the first premise is that the goods should have been taken from the petitioner for custody; that in the instant case, it was taken neither from the petitioner nor from the representative; but, it was one of unclaimed goods; that subsequently, a claim was made through the representative of the petitioner; that it was on 26.5.2006; but, the seizure was made on 2.8.2006, and the show cause notice was issued on 15.1.2001; and that it was well within six months' time.

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10.After going through the relevant provision under Sec.110 (2) of the Act, this Court is unable to agree with the contentions put forth by the petitioner's side. In the case on hand, the show cause notice cannot be found to be out of time i.e., after six months from the date of seizure. When the goods were found, on interception, they were all taken for custody by the Department on 22.5.2006. It can, at no stretch of imagination, be considered to be one as seizure as understood under Sec.110(2) of the Act. Further, assuming for a moment that the representative had produced all the documentary proof in order to establish the ownership of the property, naturally one would expect the Department to return the same. But, such a situation did not arise in this case. An opportunity was given for production of the documentary proof; but, it was not done.

11.One other circumstance is that a necessity arose for the department to issue a show cause notice initiating proceedings, which is after making a seizure as one contemplated under Sec.110 (2) of the Act. The "seizure" what is provided under Sec.110(2) of the Act, cannot connote the simple and mere detention of the goods. The detention of goods is actually taking the custody of the goods and keeping it under restraint from being taken by the parties; but, the party is entitled to produce sufficient documentary evidence, and if he shows proof, he can take it. At that juncture, no question of seizure would arise. Once the property is detained by the department, unless and until the adjudication proceedings are over, and an order is passed for the return of the property, the Officials cannot return the goods. Thus, the detaining of goods is for the purpose of enquiry, and if not sufficient proof coming forward, question of seizure of the property would arise.

12.The contention put forth by the petitioner's Counsel that the detention and seizure are one and the same cannot be accepted. At this juncture, it would be more apt and appropriate to reproduce the relevant portion of the decision of the Supreme Court reported in 1983 E.L.T. 1365 (GIAN CHAND AND OTHERS V. STATE OF PUNJAB). In that case, the Supreme Court has taken the view that seizure means to take possession of the property contrary to the wishes of the owner of the goods in pursuance of a demand under legal right, and seizure involves a deprivation of possession and not merely of custody of goods. Hence, in a case of detention, the custody of the goods is taken; but, it will not involve the deprivation of goods. In such circumstances, the word "seizure" employed in Sec.110(2) of the Customs Act cannot be said to be one of detention as put forth by the learned Counsel for the petitioner. In this case, the seizure was made only on 2.8.2006, and the show cause notice was issued on 15.1.2007. As such, it was within the period of six months' time, and hence, it is not hit by that provision.

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13.For the reasons stated above, this Court is of the considered opinion that the show cause notice is in order. That apart, it is not a fit case where the goods should be ordered to be returned since the adjudication proceedings are pending before the department. Hence, the writ petition has to necessarily fail. Accordingly, it fails and is dismissed. No costs. Consequently, connected MP is also dismissed.

Nsv/

Sd/
Asst.Registrar

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Sub Asst.Registrar

To:

1.The Joint Commissioner of
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Mumbai 400 002.

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3.The Commissioner of Customs (Air)
Air Cargo Complex
Meenambakkam, Chennai 600 027.

+ 1 cc to Mr. S. S. Radhakrishnan, Advocate, SR No.72023

+ 1 cc to Mrs. P. Kalpa Reddy, Advocate, SR No.71707

SKV(CO)
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